

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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DOUGLAS MOYLES and GINA
MOYLES,

NO. CIV. S-05-885 FCD/KJM

Plaintiffs,

v.

MEMORANDUM AND ORDER

JOHNSON CONTROLS, INC., a
Wisconsin Corporation; WILLIAM
E. THOMAS; WALLY BOMHOFF; and
DOES 1-50, inclusive,

Defendants.

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On September 9, 2004, plaintiffs, Douglas and Gina Moyles ("plaintiffs"), initiated this action in Sacramento County Superior Court. Defendants, Johnson Controls, Inc. ("JCI") and Wally Bomhoff ("Bomhoff") (collectively "defendants"), subsequently removed the matter to this court on the basis of federal question jurisdiction. Presently before the court are: 1) plaintiffs' motion to amend the second amended complaint and motion to remand; 2) defendants' motion to dismiss the second

1 amended complaint; and 3) defendants' motion to strike
2 plaintiffs' third amended complaint. All motions are opposed.¹

3 **BACKGROUND**

4 This litigation arises from the employment relationship
5 between plaintiff, Douglas Moyles, and defendant, JCI. Mr.
6 Moyles was hired by JCI as a Project Manager in or about May
7 2001. (Pls.' Second Am. Compl. ¶ 10; Def. JCI's Answer ¶ 10).
8 Plaintiffs allege that defendants William E. Thomas² ("Thomas")
9 and Bomhoff were employed by defendant JCI in managerial or
10 supervisory roles while Mr. Moyles worked for the company.
11 (Pls.' Second Am. Compl. ¶¶ 4-5.)

12 During his employment with JCI, Mr. Moyles alleges that
13 defendants JCI and Thomas directed him "to perform improper and
14 fraudulent transfers related to government contracts," and he
15 "objected to these improper and illegal directives," which
16 resulted in his being "subjected to harassment and retaliation"
17 by all three defendants. (Pls.' Second Am. Compl. ¶ 13.)
18 Plaintiffs allege that "[o]n November 12, 2004, Defendants JCI,
19 THOMAS and BOMHOFF retaliated against Plaintiff MOYLES and
20 terminated his employment with Defendant JCI." (Pls.' Second Am.
21 Compl. ¶ 43.) However, defendants respond that Mr. Moyles'
22 "employment was terminated as a result of significant
23 organizational realignment and restructuring," which was outlined

24 ¹ Because oral argument will not be of material
25 assistance, the court orders this matter submitted on the briefs.
26 E.D. Cal. L.R. 78-230(h).

27 ² Defendants allege that plaintiffs have yet to serve
28 defendant Thomas with a complaint in this action (Defs.' Mem. of
P. & A. in Supp. of Opp'n to Pls.' Mot. to Amend Compl. and to
Remand at 2.)

1 in the termination letter sent to Mr. Moyles by Bomhoff. (Def.
2 JCI's Answer ¶ 43.)

3 Plaintiffs, Douglas Moyles and his wife Gina Moyles, filed
4 their initial complaint in Sacramento County Superior Court on
5 September 9, 2004; however, this complaint was never served on
6 any of the defendants. (Pls.' Second Am. Compl. ¶ 1.)

7 Subsequently, plaintiffs filed an amended complaint on December
8 13, 2004 and served it upon defendants JCI and Bomhoff.

9 Plaintiffs filed a second amended complaint on April 25, 2005,
10 after the Sacramento County Superior Court sustained defendants'
11 demurrer to plaintiffs' first amended complaint, granting
12 plaintiffs leave to amend.

13 After plaintiffs filed their second amended complaint,
14 defendants removed the action to this court on May 4, 2005
15 pursuant to 28 U.S.C. § 1441(a), based upon original federal
16 question jurisdiction. Defendants' sole basis for removal was
17 that the third cause of action in plaintiffs' second amended
18 complaint alleges that defendants breached, *inter alia*, the False
19 Claims Act 31 U.S.C. § 3729 et. seq. On May 17, 2005, after the
20 case reached this court, plaintiffs filed a motion to amend the
21 complaint and to remand the action to state court.

22 Contemporaneously, plaintiffs filed a third amended complaint,
23 deleting the sole federal claim for relief, which they argue
24 eliminates federal subject matter jurisdiction. Subsequently,
25 defendants filed a motion to dismiss plaintiffs' second amended
26 complaint on May 24, 2005. Finally on May 31, 2005, defendants
27 filed a motion to strike plaintiffs' third amended complaint.

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I. Motion to Amend the Complaint

"A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave *shall be freely given when justice so requires.*" Fed. R. Civ. P. 15(a) (emphasis added). It is well recognized that the policy of freely granting leave to amend should be applied with "extreme liberality." DCD Programs, Ltd. v. Leighton, 833 F.2d 183, 186 (9th Cir. 1987). The Supreme Court has delineated various factors to examine when determining whether to grant leave to amend under Rule 15(a). Foman v. Davis, 371 U.S. 178, 182 (1962). These "Foman factors" include: 1) undue delay; 2) bad faith; 3) futility of amendment; and 4) prejudice to the opposing party. Id.; see also Hurn v. Ret. Fund Trust of the Plumbing, Heating and Piping Indus. of S. Cal., 648 F.2d 1252, 1254 (9th Cir. 1981). As the Ninth Circuit has continually recognized, "the crucial factor is the resulting prejudice to the opposing party." Howey v. United States, 481 F.2d 1187, 1190 (9th Cir. 1973); Eminence Capital, LLC v. Aspeon, Inc., 316 F.3d 1048, 1052 (9th Cir. 2003). The burden of showing prejudice is upon the party opposing amendment. DCD Programs, 833 F.2d at 187. "Absent prejudice, or a strong showing of any of the remaining Foman factors, there exists a presumption under Rule 15(a) in favor of granting leave to amend." Eminence Capital, 316 F.3d at 1052.

Although defendants oppose plaintiffs' motion to amend, they have not furnished any facts demonstrating that the amendment is

1 made in bad faith, will cause undue delay, or will prejudice the
2 defendants. Nonetheless, the court will examine the relevant
3 factors.³

4 First, plaintiffs have not caused undue delay, as they filed
5 their motion to amend the complaint less than two weeks from
6 removal of the action to this court. Furthermore, there is no
7 indication that plaintiffs are seeking amendment in bad faith.
8 While plaintiffs' motivation for amending the complaint is to
9 obtain remand, the Ninth Circuit has stated that "[a] plaintiff
10 is entitled to file both state and federal causes of action in
11 state court" then "settle certain claims or dismiss them with
12 leave of the court" upon removal. Baddie v. Berkeley Farms,
13 Inc., 64 F.3d 487, 490 (9th Cir. 1995). The court went on to say
14 that such practice is not manipulative and need not be
15 discouraged unless there is reason to believe that the inclusion
16 of the federal claims was to put the defendants through the
17 removal-remand procedure. Id. at 490-91. Defendants have not
18 provided the court with any evidence that plaintiffs engaged in
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21 ³ In their motion to amend, plaintiffs argue that they
22 are entitled to file a third amended complaint, "as a matter of
23 right since defendants have not filed any responsive pleading in
24 this action." Plaintiffs are correct that Rule 15(a) allows a
25 party to "amend the party's pleading once as a matter of course
26 at any time before a responsive pleading is served." Fed. R.
27 Civ. P. 15(a). Although defendants had not filed a responsive
28 pleading when plaintiffs filed their third amended complaint,
plaintiffs already had amended their complaint twice in state
court. A district court "takes the case as it finds it on
removal and treats everything that occurred in the state court as
if it had taken place in federal court." Butner v. Neustadter,
324 F.2d 783, 785 (9th Cir. 1963). Thus, plaintiffs have already
utilized their "free amendment" and as a result, must seek leave
of court to amend their complaint.

1 such conduct.⁴

2 Additionally, futility of amendment is inapplicable to the
3 present facts because plaintiffs seek to amend their complaint to
4 delete a claim for relief, rather than add or clarify an existing
5 claim.

6 Finally, the predominant factor, prejudice to the opposing
7 party, is not present. This matter is still in the early stages
8 of litigation. Discovery has yet to be conducted at either the
9 state or federal level and, prior to removal, the case was set
10 for a case management conference in state court. The parties
11 have completed little work to date that will be disturbed by
12 granting plaintiffs leave to amend their complaint. The burden
13 of showing prejudice is upon the party opposing the amendment and
14 defendants have done nothing to carry this burden. Based on the
15 above considerations, it is clear that plaintiffs motion to amend
16 under Rule 15(a) should be granted.

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24 ⁴ To the contrary, plaintiffs argue that they only
25 included the reference to federal law because they were required
26 to differentiate their employment retaliation claim from their
27 other retaliation claims, after the state court sustained
28 defendants' demurrer to their second amended complaint. (Pls.'
Mem. of P. & A. in Supp. of Mot. to Amend and to Remand at 4.)
Now upon removal, plaintiffs wish to remove any possible federal
claim for relief, indicating their desire to maintain their
action in state court.

II. Motion to Remand

It is a longstanding rule that the propriety of removal jurisdiction is determined at the time of removal. See Pullman Co. v. Jenkins, 305 U.S. 534, 537 (1939). Therefore, the Ninth Circuit has held that plaintiffs cannot compel remand by amending their complaint to eliminate the federal claims which provided the basis for removal. Sparta Surgical Corp. V. Nat'l Ass'n of Sec. Dealers, Inc., 159 F.3d 1209, 1213 (9th Cir. 1998). However, federal courts have discretion to remand the remaining pendant state claims when retaining jurisdiction would be inappropriate. Harrell v. 20th Century Ins. Co., 934 F.2d 203, 205 (9th Cir. 1991). The Supreme Court has directed district courts to consider judicial economy, convenience, fairness, and comity, as well as forum manipulation, when determining whether to remand a case to state court. Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 357 (1988). Based on these factors, the Ninth Circuit recognized that in the usual case "it is generally preferable for a district court to remand remaining pendant claims to state court." Harrell, 934 F.2d at 205.

In opposition to the motion to remand, defendants rely on Sparta, 159 F.3d at 1213, for the proposition that plaintiffs cannot compel the remand of this case to state court by amending their complaint. While defendants' explication of Sparta's holding is correct, that decision is not determinative of this motion. As discussed above, district courts possess the discretion to decide whether to retain jurisdiction over state law causes of action after the federal claims for relief have dropped out of the litigation. Thus, the Ninth Circuit has

1 acknowledged, in a case analogous to the present one, that remand
2 is proper where plaintiffs amend their complaint to remove their
3 federal claims and move for remand without delay. Baddie, 64
4 F.3d at 490-91.

5 Applying the above considerations to the present case, the
6 factors clearly point in favor of remand. As previously
7 indicated, plaintiffs have been granted leave to amend their
8 complaint, which will eliminate the sole federal claim for relief
9 that provided a basis for removal, and the remaining claims arise
10 under state law. There is no reason for this court to proceed
11 with this matter when the state court is equally competent to
12 hear the case and more familiar with the law of its own forum.
13 Thus, principles of comity favor deference to the judgment of the
14 state court.

15 Judicial economy also weighs in favor of remand. This case
16 was removed in the beginning of May, so this court has played
17 little part in the overall litigation of the matter. The present
18 motions before the court are the first substantive considerations
19 undertaken, which will not need to be duplicated regardless of
20 whether the case is remanded. Furthermore, the state court
21 already considered the substance of plaintiffs' causes of action
22 when ruling on defendants' demurrer; thus, it has invested
23 greater time and resources in the case.

24 Considerations of convenience and fairness do little to sway
25 the balance for or against remand. Both the state and federal
26 fora are located in Sacramento, approximately five blocks from
27 one another, so both are equally convenient to the parties. As
28 to considerations of fairness, there is no reason to doubt that a

1 state forum will provide an equally fair adjudication of the
2 matter as this court.

3 Finally, there is no reason to believe that plaintiffs are
4 engaging in manipulative pleading practices. As the Ninth
5 circuit stated in Baddie, 64 F.3d at 491, "[p]laintiffs in this
6 case chose the state forum. They dismissed their federal claims
7 and moved for remand with all due speed after removal. There was
8 nothing manipulative about that straight-forward tactical
9 decision" In an exercise of discretion, this court finds
10 that the state law causes of action, as set forth in the third
11 amended complaint, should be remanded to the Sacramento County
12 Superior Court.⁵

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18 ⁵ Defendants argue that the court should "consider
19 Defendants' pending Motion to Dismiss prior to deciding whether
20 to remand this case, as it is likely that Defendant Bomhoff will
21 be dismissed, which will provide diversity jurisdiction."
22 (Defs.' Mem. of P. & A. in Opp'n to Pls.' Mot. to Amend Compl.
23 and to Remand at 4.) Defendants contend that "this will promote
24 judicial economy," (Id. at 5.) yet they offer no case support for
25 this proposition. Defendants have not persuaded the court that
26 the parties' motions should be decided out of the order in which
27 they were filed. Additionally, defendant Thomas is a resident of
28 California, as are plaintiffs and defendant Bomhoff. There is no
indication Thomas has been dismissed from this action and his
inclusion as a named defendant destroys diversity of citizenship.
Morris v. Vitek, 412 F.2d 1174, 1176 (9th Cir. 1969) (stating that
"[w]henver federal jurisdiction in a removal case depends upon
complete diversity, the existence of diversity is determined from
the fact of citizenship of the parties named and not from the
fact of service.") Thus, judicial economy is not served by first
considering defendants' motion to dismiss, as defendant Bomhoff's
dismissal from this action will not impact this court's
discretionary decision to remand the action to state court.

CONCLUSION

For the foregoing reasons, plaintiffs' motion for leave to amend their complaint is GRANTED. Additionally, plaintiffs' motion to remand the action to Sacramento County Superior Court is GRANTED. Because plaintiffs are allowed to amend their complaint, defendants' motion to dismiss the second amended complaint is VACATED AS MOOT. For the same reasons, defendants' motion to strike the third amended complaint is VACATED AS MOOT.

IT IS SO ORDERED.

DATED: June 29, 2005

/s/ Frank C. Damrell Jr.
FRANK C. DAMRELL, Jr.
UNITED STATES DISTRICT JUDGE